COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C 20544

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TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Robert L. Hinkle, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2007**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 16, 2007, in Washington, D.C. At this meeting the Committee began its long-term project on restyling the Evidence Rules. It also considered the following matters:

1) A possible amendment to Evidence Rule 804(b)(3) to provide a uniform requirement for for establishing corroborating circumstances guaranteeing trustworthiness;

2) developments in the law of confrontation after *Crawford v. Washington*, in order to consider whether any amendments to the Evidence Rules are necessary as a result of that decision; and

3) the necessity of commenting on proposed legislation that would alter the application of Evidence Rule 404(b) in prosecutions involving hate crimes.

None of the above matters require action by the Standing Committee at this time.

Part III of this Report provides a summary of the Committee's projects. A complete discussion of these matters can be found in the draft minutes of the Fall 2007 meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. The Restyling Project

At its Fall 2007 meeting the Committee agreed upon a protocol and a timetable for its project to restyle the Evidence Rules. The Committee also reviewed — on a preliminary basis — some rules that had been restyled by Professor Kimble as draft examples for the Committee's information.

The Committee established a step-by-step process for restyling that is substantially the same as that employed in previous restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Committee agreed that the Evidence Rules will be divided into three parts, and the process described above will therefore be conducted in three separate stages. The Committee also agreed, however, that the entire package of restyled rules should be submitted for public comment at one time.

The Committee noted that the Civil Rules restyling project proceeded through subcommittees. But the Committee determined that, at least for now, the review of restyled rules would be by the Committee as a whole. The Committee has relatively few members, so that a subcommittee structure may not have provided sufficient members to do the work. Moreover, the scope of the project is substantially smaller than was the Civil Rules project.

The Committee also agreed on a working principle for whether a change is one of "style" (in which event the final determination is made by the Style Subcommittee) or one of "substance" (in which event the final decision is for the Committee). The working definition can be described as follows:

A change is "substantive" if:

1. Under the existing practice in any circuit, it could lead to a different result on a

question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or

2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question); or

3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

4. It changes what Professor Kimble has referred to as a "sacred phrase" — "phrases that have become so familiar as to be fixed in cement."

The Committee made several other preliminary determinations on how its restyling would be conducted, including: 1) The Committee would not, at this point, attempt to draft a rule covering definitions; 2) It would place minor substantive changes on a separate track, as did the Civil Rules Committee, and it would determine at a subsequent point when to propose any necessary substantive changes; and 3) the Committee's goal is to have the entire package of style amendments approved for release for public comment in August, 2009.

B. Consideration of Possible Amendment to Evidence Rule 804(b)(3)

The Committee discussed the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible; but by its terms the Rule imposes no similar requirement on the prosecution. The Committee expressed interest in at least considering an amendment that would extend the corroborating circumstances requirement to all proffered declarations against penal interest.

The possible need for the amendment arose after the Supreme Court's decision in *Whorton v Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. Another possible reason for the amendment is that the courts are in dispute about whether the government must provide corroborating circumstances under the existing rule. Finally, courts that do apply the corroborating circumstances requirement to government-offered declarations against interest differ on what "corroborating circumstances" mean. Some courts allow the government to present corroborative evidence that supports the accuracy of the declarant's statement, while other courts demand that the showing must be made exclusively through the circumstances under which the declarant's statement is made.

Committee members expressed interest in proceeding with an amendment to Rule 804(b)(3), reasoning that it would provide an important guarantee of reliability in criminal prosecutions, and that it could rectify confusion and disputes among the courts. But the Committee decided to defer consideration of an amendment, in response to a request from the Department of Justice representative to allow some time for the courts to construe the rule in light the Supreme Court's decisions on the relationship between the right to confrontation and the hearsay exceptions. The Committee agreed to wait until the next meeting to consider the amendment in detail. The Department of Justice representative promised to provide the Committee, before its next meeting, any relevant information that the Department can obtain about the current operation of Rule 804(b)(3) as applied to hearsay offered by the government.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant. Subsequently the Court in *Davis v. Washington* held that a hearsay statement is not testimonial if the primary motivation for making the statement was for some purpose other than for use in a criminal prosecution. And as discussed above, the Court in *Whorton v. Bockting* held that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford and the subsequent case law raises at least the possibility that some of the hearsay exceptions in the Federal Rules of Evidence might be subject to an unconstitutional application in some circumstances. If that possibility becomes a reality, it may become necessary to propose amendments to bring those hearsay exceptions into compliance with constitutional requirements. At its Fall 2007 meeting, however, the Committee unanimously resolved that there is no need to propose any amendment in response to *Crawford* at this time. It is likely that no amendment will be necessary in any event, because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial and therefore admissible under the Confrontation Clause. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and by the lower courts. Even if the Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to to codify *Crawford* is unwise at this point, given the rapid development of the case law. The Committee will continue to monitor case law developments under *Crawford* and *Davis*.

D. Consideration of Hate Crimes Legislation

At its Fall 2007 meeting the Committee reviewed hate crime legislation that is pending in both Houses. Both bills contain language that purport to regulate admission of uncharged misconduct in a way that might be difficult to square with Evidence Rule 404(b). The language is identical in both bills, and provides as follows:

(6)(d) Rule of Evidence- In a prosecution for an offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically relates to that offense. However, nothing in this section affects the rules of evidence governing impeachment of a witness.

Some possible concerns about the statutory language include 1) its distinction between substantive and impeachment evidence — one that is not made so explicitly in the Evidence Rules; 2) the scope of the bar against use of evidence of expression or association, which may conflict with admissibility of such evidence under Rule 404(b); 3) the vagueness of the exception for evidence that "specifically relates" to the offense and the likelihood that the exception will swallow the rule of exclusion; and most importantly 4) the general lack of connection between the statutory language and the language of Rule 404(b), which covers the same ground.

After discussion the Committee decided not to submit any comment to Congress on the evidentiary concerns raised by the legislation. The Committee noted among other things that the legislation does not purport to amend the Federal Rules of Evidence directly, and therefore the Committee would not appear to have a strong justification for commenting on the legislation. Moreover, the effect of the legislation is limited as it applies only in hate crime prosecutions.

IV. Minutes of the Fall 2007 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2007 meeting is attached to this report. These minutes have not yet been approved by the Committee.